

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION FOUR**

BETHLEHEM HAULAGE LLC¹

Employer

and

Case 04-RC-266405

**INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, LOCAL 773**

Petitioner

DECISION AND DIRECTION OF ELECTION

Bethlehem Haulage (the Employer) operates a grocery distribution facility in Bethlehem, Pennsylvania. International Brotherhood of Teamsters, Local 773 (Petitioner or the Union) seeks to represent a bargaining unit of four dispatchers employed at this facility. At issue is the supervisory status of the dispatchers. The Employer asserts the dispatchers are supervisors within the meaning of Section 2(11) of the National Labor Relations Act (the Act), while Petitioner maintains the dispatch supervisors are not statutory supervisors.

A hearing officer of the National Labor Relations Board (the Board) held a videoconference hearing in this matter on October 15, 16 and 19, 2020², and both parties filed briefs. As explained below, based on the record, the briefs, and relevant Board law, I find that the Employer has not met its burden of establishing that the dispatchers are supervisors. The unit sought is otherwise appropriate and undisputed, and therefore I have directed an election in the petitioned-for unit. Because of the current state of the COVID-19 pandemic in Bethlehem and Northampton County, where the facility is located, I have directed that the election take place by mail.

I. THE EMPLOYER’S OPERATIONS

The Employer is a wholly-owned subsidiary of C&S Wholesale Grocers (C&S), a grocery distributor based in Keene, New Hampshire with operations throughout the United States. C&S has several facilities located in close proximity to one another in Bethlehem, Pennsylvania, and the Employer operates out of the facility known as “Bethlehem IV, a facility it shares with C&S warehouse operations. Drivers from the Employer’s facility service customers in the New York City and Philadelphia metropolitan areas, as well as portions of New Jersey, Maryland, and New England.

¹ The names of the parties appear as amended at hearing.

² All dates are in 2020 unless otherwise indicated.

The Employer employs approximately 35 drivers, a payroll coordinator, and the four dispatchers at issue.³ Traditionally, the Employer has also employed a terminal manager as its most senior manager or supervisor, but that position is currently vacant. The dispatch supervisors currently report to C&S Regional Transportation Manager Peter Zekas. Zekas has an office at the Bethlehem II facility, approximately two miles from Bethlehem IV, and he also oversees several other C&S operations in the Bethlehem area.

Two dispatchers, referred to as “day” dispatchers, are scheduled to work staggered shifts beginning in the morning and continuing until the evening, while two are scheduled from approximately midnight to 9:00 a.m. and are considered “night” dispatchers. The dispatchers work out of an office on the first floor of Bethlehem IV, consisting of a series of workstations with windows, allowing the drivers to speak to the dispatchers and exchange paperwork. The office has a locked door that is opened by the identification badges of the dispatchers and C&S management. In addition to assigning routes to drivers, discussed in detail in the following section, the dispatchers’ workday involves distributing and collecting drivers’ paperwork, data entry, and communicating with the drivers while they are performing deliveries.

Loads are palletized, and the pallets are placed in trailers by C&S warehouse employees. When the drivers begin work, they arrive at the facility, obtain their paperwork from the dispatchers, get their vehicle, collect the correct pre-loaded trailer, and depart. A driver, upon arrival at a customer’s facility, uses a pallet jack, or an electronic pallet jack, to remove the palletized loads from the trailer and provide it to the customer. The customer then examines the delivery and completes necessary paperwork, and the driver returns to the Employer’s facility and submits that paperwork. While the primary function of the drivers is to make deliveries to customers, drivers will also occasionally bring materials to the Employer’s facility to restock the warehouse, referred to as a “backhaul.”

The Employer began operations in 2015, and Petitioner has represented a bargaining unit of the drivers since 2016. To date, the parties have not reached a collective-bargaining agreement.⁴

³ The proper title of the petitioned-for employees is a matter of dispute in the record. In the petition, Petitioner identified the classification as “dispatcher,” while the Employer referred to the title as “supervisor, driver/dispatch” in its position statement. At hearing, witnesses referred to the position as “dispatcher” or “dispatch supervisor,” but documents in the record also refer to the position as “transportation supervisor.” The record does not contain a position description or other document that contains a definitive title. The title used has no impact on the supervisory determination, and I have referred to the position in this Decision simply as “dispatcher” in the interest of simplicity and clarity.

⁴ The record contains multiple references to a “status quo agreement.” It appears that this term refers to the conditions that existed before the Union was certified to represent the drivers, inasmuch as the parties have not yet agreed to an initial collective-bargaining agreement. An unfair labor practice settlement agreement memorializes the post-recognition status quo that applies to the drivers.

II. THE SUPERVISORY ISSUE

A. Dispatcher Duties

i. Pairing Drivers to Routes

The dispatch process begins when a “K-14 report” is delivered from the Employer’s headquarters in Keene to the day dispatchers at approximately 4:00 p.m. each afternoon. The report identifies how many deliveries will be needed the following day and groups these deliveries into loads allowing for a single vehicle to efficiently make several stops. The K-14 report also includes a time the load should leave the Employer’s facility (referred to as the “gate” or “dispatch time”), a time each delivery should arrive at the customer’s facility, and the larger window of time when the customer is willing to accept a delivery.

After receiving the K-14 report the day dispatchers match the drivers to the loads. To pair drivers and deliveries, the dispatchers apply a number of factors. First, the dispatchers consider the geographic areas involved, as each driver has a set area in which they operate. Some drivers operate broadly, up to and including all the destinations where the Employer has customers, and others deliver in a narrower area, as limited as a single borough in New York City. Once geography is considered, the dispatchers look at the gate time for the route and the drivers’ start times. A driver’s start time also may be broad, such as “2:00 a.m., 3:00 a.m., 4:00 a.m., 5:00 a.m.” or it may be narrow, such as “2:00 a.m.”⁵ Some of the drivers share the same start time and geographical areas. The dispatchers maintain a list of the drivers’ geographic areas and start times, and, in making assignments, dispatchers match the drivers’ start times with the gate times provided in the K-14 report.

Geography and timing are the two primary considerations made in assigning routes, but dispatchers also need to verify that drivers have enough Department of Transportation (DOT) hours and consider special circumstances. Drivers are limited to operating a truck for 70 hours over eight days and cannot work for more than 14 consecutive hours, per DOT regulations. The payroll coordinator provides the dispatchers a daily list of available hours so they can verify that drivers have the hours available to complete the assigned route. The dispatchers also have a list of drivers who are prohibited from servicing certain customers, due to a past dispute or other reasons.

If, after these steps are completed, the dispatchers have more eligible drivers than routes, the final consideration is an attempt to equalize drivers’ hours, scheduling those drivers with the fewest hours worked during the week to the remaining routes. For example, all other considerations being equal, if a dispatcher has 30 loads and 31 drivers, the driver that will not

⁵ There is considerable confusion in the record regarding the term “start time.” Start time is best understood, and is used in this Decision, as referring to the driver’s availability, while gate time refers to the beginning of the route. At points in the record, start time is used to describe both of these separate concepts. Finally, the drivers do not actually start work at their start times. Most, if not all, drivers report to the facility and clock in well before leaving on their route for the day.

receive a load, and will become an “extra,” is the driver that has already worked the most hours in that week.⁶

Dispatchers testified that it may only take 30 minutes to an hour for an experienced dispatcher to complete the process. Once the pairing is complete, the dispatchers contact the drivers and provide them with the details of their route for the following day. Drivers are required to confirm their dispatch within 30 minutes of notification, and by policy a driver who does not confirm in that period will not receive a route. In this connection, the record contains an email from Zekas directing a dispatcher to send a driver home because the driver did not confirm a dispatch in a timely manner.

The number of routes rarely, if ever, precisely matches the number of drivers; on most days there are more routes than drivers or more drivers than routes. If there are more routes than drivers, the dispatchers contact the Employer’s third-party partners and request additional help. Dispatchers first contact Optimum, which provides drivers who utilize the Employer’s equipment. If Optimum cannot provide a sufficient number of drivers the dispatchers contact JB Hunt, which employs drivers who use their own equipment.⁷

If there are more drivers than routes the excess drivers are considered extras. An extra is required to report to the facility and be available to fill in for drivers who are unable to perform their routes, or to perform backhauls if needed. All, or almost all, routes leave the Employer’s facility between midnight and 5:00 a.m., and accordingly the night dispatchers are responsible for assigning routes to the extras. The night dispatchers monitor the drivers arriving and departing on their routes and, if a route becomes available for any reason, they assign the available route to an extra, utilizing the same checklist of factors the day dispatchers use, as described above.⁸ The night dispatchers also receive information on backhauls that need to be performed and will assign these tasks if extras are available. Once all work is assigned, the night dispatchers send any remaining extras home.

The former terminal manager sent an email, dated August 24, containing very specific instructions to dispatchers regarding the assignment process. That document first contains the following instructions for the night dispatchers:

⁶ Zekas initially testified on two occasions that assignments of extras to available routes are made to the driver with the most available hours. Thereafter, based on leading questions from counsel, he stated that dispatchers would make the decisions based on their “experience.” The record does not, however, contain any examples of how this experience has been applied or what factors dispatchers would consider other than the number of hours.

⁷ The record indicates that because JB Hunt drivers use JB Hunt equipment it is significantly more expensive for the Employer to use this option. Accordingly, JB Hunt is only used once the Optimum option is exhausted. There is no evidence of a dispatcher or anyone else choosing to use JB Hunt over Optimum or forego using Optimum for any reason.

⁸ The record does not explain why it occurs, but it appears the night dispatchers must deal with “callouts” with some regularity. A callout, also referred to as a “calloff,” occurs where a driver, who has presumably received a dispatch and confirmed it the day prior, does not report for the assignment.

- No load is to be held for any driver past 30 minutes.
- Late drivers will be sent home immediately provided all routes are covered.
- No load or work is to be created for any extra other than covering callouts. (no trailer swap, backhauls or peddle run without authorization).
- Extras will be sent home once last route has been dispatched.
- All callouts need to confirm at time of callout by either Sick/Personal and notated as such.
- Shift update is to reflect any concerns or issues in the comments.

The email then provided specific instructions to the day dispatchers, who are responsible for pairing drivers with routes, as follows:

- No route is to be assigned to a driver resulting in late departure based on HOS. (Driver exceeding his allotted time will not be scheduled on start time but 10 hour break time unless authorized)
- All drivers are to be told at dispatch their stops plus a backhaul (Eliminate the term possible backhaul)
- Load changes regarding sequences are not to be changed if the possibility any stops will be late due to change.
- Driver who has not confirmed within 30 minutes after call, route is to be assigned. (no confirmation will be accepted by text, email, cell or 3d party)
- All call outs need to be confirmed at time of callout by either Sick/Personal and notated as such.
- Shift update is to reflect any concerns or issues in the comments.⁹

The email concludes with additional instructions to dispatchers regarding when time-off requests are allowed and not allowed, and how the paperwork regarding time-off requests should be completed.

Other emails from Zekas reiterated certain points that appear in the August 24 email. Some are very specific, such as a May 18 email directing that a specific driver be sent home if he appears at the facility because he did not confirm his dispatch. Others are general, such as a January 9 email to the dispatchers reminding them of the need to send extra drivers home once all routes have been dispatched.

On occasion, loads will be combined or split. The evidence is in conflict regarding who initiates this process. When questioned regarding who makes the decision to combine runs, Zekas testified it was the dispatchers, and that he would be notified, but a dispatcher who testified on this point indicated she would not combine or split a run without discussing it with Zekas and obtaining his approval. A September 1 email from Zekas directed the dispatchers to combine several loads and use the two Optimum drivers made available to cover driver callouts.

⁹ For ease of reading, obvious typographical errors in these lists have been corrected.

ii. Time off Requests

The Employer utilizes a human resources tool referred to as Workday to manage time-off requests. Each dispatcher is responsible for a “team” of approximately eight to ten drivers in Workday, and dispatchers have been instructed that up to three drivers per team can be off on a given weekday, and one on weekends. The dispatcher approves or denies the time-off requests in the system up to this limit on a first-come first-served basis.

As noted above, the August 24 email from the former terminal manager contained instructions to the dispatchers regarding when time-off requests are allowed and how the paperwork should be completed. The record also contains emails from terminal managers in 2016 and 2018 directing how time-off requests should be handled. These emails include instructions such as the three-driver limit and where to file the requests.

iii. Overtime

As a term of their employment, drivers are guaranteed a minimum of 50 paid hours per week, although the evidence suggests that many drivers work well beyond this threshold. Drivers are paid time-and-a-half for hours worked beyond 40 in a week, and as such they are guaranteed to earn at least 10 hours of overtime per week. Drivers are expected to complete the routes they are given, and if performing a route leads them to accrue overtime they are not required or expected to obtain separate authorization or permission.

iv. Issuing Equipment

As previously noted, the Employer’s loads are on pallets, and delivering the product requires drivers to use a pallet jack or electronic pallet jack at a customer’s facility. Electronic jacks are easier to use, but the Employer does not have enough of them to assign one to every route. A driver may request an electronic jack from a dispatcher, in which case the dispatcher can deny or approve the request, assuming the location appears on the report. If the location does not appear on the report the dispatcher may view photographs of the customer’s surroundings online and determine whether an electronic jack is necessary. A dispatcher testified that she denied a request for an electronic jack after examining pictures of the customer’s facility and seeing a loading dock. If a dispatcher investigates a request, he or she will notify the shipping department, where the electronic jacks are kept, and the C&S department responsible for generating the K-14 report, which designates those routes requiring an electronic jack on the report.

v. Emergencies

In the event a vehicle breaks down during a route, the driver contacts the dispatchers and the Employer’s third-party maintenance provider. The driver and dispatcher, possibly with input from the maintenance provider, will assess the situation and determine the impact on the route and how to keep the route on schedule. Options include waiting for the vehicle to be repaired and continuing on the route, sending an extra driver with another vehicle to transfer the load, or locating a nearby driver to finish the route. In each instance the dispatcher notifies the Customer Service

department, which in turn notifies the customer of a delay, arranges for an alternative delivery time, or otherwise is responsible for the customer contact.¹⁰

If a tractor or trailer has a mechanical issue while at the Employer's facility, the dispatcher directs the driver how a change can be made to ensure delivery, such as contacting the mechanics at the Employer's facility or having the warehouse staff move the load to another trailer.

Another unexpected event occurs when a driver, for unforeseen reasons, is at or near the 70- or 14-hour DOT limit. This information is tracked by the Employer's electronic distribution system, which would notify the dispatchers on duty. A dispatcher will then notify the driver of the need to have another driver complete the route, if it is the former, or take a 10-hour layover, if it is the latter. As with a mechanical emergency, the dispatcher will assess how the route can be completed while Customer Service contacts the customer and either notifies it of the delay or makes alternative arrangements.

vi. Discipline

Several incidents of employee misconduct were discussed at the hearing. On one occasion, a dispatcher notified management of a threat made by a driver to dispatchers. A driver became upset regarding his assignment, or lack thereof, and kicked a trash can in the Employer's facility. The driver then went outside where he encountered another dispatcher and, after overturning a picnic table, threatened to return and shoot the dispatchers and others. The incident was recorded by the Employer's video monitoring equipment. A senior human resources business partner for C&S testified that, along with the dispatcher and the terminal manager, he made the decision to terminate the driver, but there is no evidence that the dispatcher was involved in the determination beyond reporting the incident.

On another occasion, a dispatcher sent a driver for a drug screening following an accident, and the driver was ultimately terminated after a positive result. There is no dispute that DOT regulations require the Employer to have drivers take a drug test following an accident, and that it is the Employer's policy to automatically terminate a driver if that test is positive.

In May 2020, Zekas sent an email to dispatchers notifying them of their reporting responsibilities related to "employee conduct issues." The email notes incident reports are to be submitted in situations of "insubordination, refusal to layover/work, unprofessional behavior, policy disputes/questions."

vii. Miscellaneous

Zekas testified that while no hiring has occurred in the last four years, if hiring does occur, dispatchers would interview and make a recommendation regarding whether to hire the applicant. He acknowledged, however, that dispatchers were not involved in the hiring process in July of 2015 when the Employer was beginning operations and the current drivers were hired.

¹⁰ The Employer does not have any Customer Service employees, so the Customer Service department referenced in the record is presumably part of C&S.

Zekas also testified that while no layoffs or recalls of drivers have occurred during this same period, if they did, dispatchers would also make recommendations in this regard. Additionally, Zekas testified that drivers are not currently evaluated because of the status quo requirement, but absent the status quo obligation dispatchers would evaluate drivers.

Newly hired dispatchers shadow more experienced dispatchers, who help them learn their job functions. Unlike drivers, who are paid on an hourly basis, dispatchers are salaried.

B. ANALYSIS

i. SECTION 2(11) STANDARD

Supervisory status under the Act depends upon whether an individual possesses authority to act in the interest of the employer in the matters and in the manner specified in Section 2(11) of the Act, as follows:

The term “supervisor” means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Possession of any one of these authorities is sufficient to confer supervisory status if the authority is exercised with independent judgment and not in a routine manner. *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006); *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 711 (2001). As stated by the Board in *Oakwood*, “to exercise independent judgment an individual must at a minimum act, or effectively recommend action, free of control of others and form an opinion or evaluation by discerning and comparing data.” *Oakwood* at 692.

The burden of establishing supervisory status rests on the party asserting that status. *Croft Metals, Inc.*, 348 NLRB 717, 721 (2006). Supervisory status cannot be established by record evidence that is inconclusive or otherwise in conflict. *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). Mere inferences or conclusory statements, without detailed, specific evidence, are insufficient to establish supervisory authority. *Lynwood Manor*, 350 NLRB 489, 490 (2007); *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006). Any lack of evidence in the record on an element necessary to establish supervisory status is construed against the party asserting supervisory status. *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1048 (2003).

Before turning to the specific Section 2(11) factors, I note two preliminary issues. First, on brief, the Employer faults the credibility of numerous witnesses. A representation case hearing is a formal proceeding, but it is investigatory, intended to make a full record, and is nonadversarial. Accordingly, consistent with NLRB Casehandling Manual (Part Two) Representation Proceedings Sec.11181 and 11185, I have not made credibility determinations in regard to testimony adduced

at hearing. See *Marian Manor For the Aged and Infirm, Inc.*, 333 NLRB 1084 (2001)(“... a preelection hearing is investigatory in nature and credibility resolutions are not made.”)

Second, the Employer makes a number of factual assertions regarding what dispatchers *would* do if the Employer was not constrained by its status quo obligations. However, there is no contention that dispatchers have ever performed these duties, or that the Employer has established or documented any plan for future responsibilities; the only evidence is the testimony of the Employer’s managers regarding what they believe they would do in the future. Ultimately, I have not considered these assertions, as these general future plans represent too speculative a basis upon which to make factual findings. Indeed, the dispatchers’ purported future authority falls short even of the “paper authority” that the Board has repeatedly found insufficient to establish supervisory status. See, e.g., *Lucky Cab Co.*, 360 NLRB 271(2014). Instead, in addressing the factors that follow I have only considered the evidence in the record regarding what duties the dispatchers have actually performed.

ii. SECTION 2(11) FACTORS

a. Assign

In the Section 2(11) context, "assignment" is defined as the "giving [of] significant overall duties, i.e., tasks, to an employee," but "significant overall duties" do not include "ad hoc instructions to perform discrete tasks." *Oakwood Healthcare*, 348 NLRB at 689. Assignment also includes designating an employee to a place, such as a location, department, or wing, and appointing an employee to a time, such as a shift or overtime period. *Id.* Distributing assignments to equalize work among employees’ well-known skills is considered a routine function not requiring the exercise of independent judgment. *Golden Crest Healthcare Center*, supra, 348 NLRB at 730, n.9.

The Employer argues that dispatchers, in pairing routes and drivers, are “assigning” work to the drivers in the context of Section 2(11), in that they are designating drivers to a place and time. The issue in this case is whether, in pairing drivers and routes, the dispatchers are using independent judgment or whether these assignments are merely a routine exercise. In *Oakwood*, the Board emphasized that a spectrum exists between decisions that are controlled by detailed directions and those that are wholly free from restraints. *Id.* at 693. Where a decision falls on that spectrum, the degree of independent judgment present is the critical question. *Id.*

In this case the dispatchers are largely constrained in the use of independent judgment by a series of rules, guidelines, and instructions. This begins at the very first step in the dispatch process, when dispatchers receive the K-14 report. That report, identifying the number of loads (and by extension the number of drivers), the destinations of those loads, the time the loads will be delivered, and the order in which the driver will perform the deliveries, provides extensive information about the next day’s deliveries before the dispatchers are involved.

Once the dispatchers begin pairing, they follow an established series of steps that match drivers to routes. The considerations by which they assign routes are specific, documented criteria such as geographic limitations and start times that, as a function of the Employer’s status quo

obligation, are not flexible. Similarly, the dispatchers have no authority to modify the DOT limits of drivers' hours, but simply disqualify drivers based on a report from the payroll administrator. Other reports, such as the list identifying drivers who are not allowed to service certain customers, similarly remove a driver from consideration. These limitations and requirements do not permit the use of independent judgment by the dispatchers.

The final step in the process, equalizing hours, resolves any remaining questions without the need for the dispatchers to consider any factors that might use independent judgment, such as balancing skills, drivers' relationships with customers, or any other factor. There is no evidence of a dispatcher completing these steps and having a route assignment unresolved or a dispatcher relying on a factor outside these steps in pairing a driver to a route. The routine nature of this pairing is evidenced by the relatively minimal amount of time it requires. Experienced day dispatchers are able to complete this process in as little as 30 minutes or an hour, a small portion of their workday.

Additionally, directives from management, such as the August 24 email, provide specific instructions on how to resolve questions that may otherwise require the use of judgment, including how long to allow a driver to confirm the dispatch and how long to hold an assigned load for a driver who is late. These directives do not identify factors for the dispatchers to consider or balance, but instead provide specific instructions regarding what must be done. The testimony is in conflict regarding dispatchers' ability to combine and split loads, but the documentary evidence contains examples of Zekas providing specific instructions on how to handle these issues, which suggests that the dispatchers do not use independent judgment in this area.

The Employer also relies on the role of dispatchers regarding overtime, time-off requests, and issuing pallet jacks to drivers as evidence of their ability to make assignments utilizing independent judgment. With respect to overtime, the Board has held that the scheduling of overtime, if carried out within fixed parameters established by management, is routine and does not indicate supervisory status. *Dico Tire, Inc.*, 330 NLRB 1252 (2000). In this case, drivers earn overtime – the 50-hour minimum guarantees it – but there is no evidence dispatchers are considering or making choices regarding overtime in pairing drivers to routes. Indeed, to the extent overtime is considered in the pairing process, it is in the last step, equalizing hours, which has the effect of minimizing overtime.

The dispatchers' role in granting or denying time-off requests is similarly routine, inasmuch as the Employer has provided specific instructions as to when requests are to be approved and denied, as well as when these submissions can be properly submitted by the drivers. Regarding drivers' requests for electronic pallet jacks, at least one dispatcher has taken the initiative to investigate whether an electronic jack is necessary and make a recommendation to modify the electronic jack list, but other dispatchers apparently simply approve or reject the request based on the list as it stands. Although this review and recommendation process could be evidence of a dispatcher utilizing independent judgment, I find the evidence is ultimately insufficient. It is not clear from the record if this investigation and recommendation was limited to one instance or is part of a broader pattern, and there is no evidence regarding what, if any, review took place by the C&S department that generates the K-14 report and maintains the list. Moreover, the authority to assign equipment is not one of the indicia of supervisory authority listed in Section 2(11) and is

at most a secondary indicium. See *St. Petersburg Limousine Service*, 223 NLRB 209 (1976), (dispatchers' assignment of vehicles to drivers is "incidental" to their primary responsibilities). Absent primary indicia of supervisory status, secondary indicia are insufficient to confer supervisory status. See *Pacific Coast MS*, 355NLRB 1422, 1423 n. 13 (2010), *Training School at Vineland*, 332 NLRB 1412, 1412–1413 n. 3 (2000).

The dispatchers need to use some discretion in dealing with emergencies or unexpected situations. Due to the nature of these events, it is impossible for management to provide specific instructions for each circumstance; managers may not be available in the overnight or early morning hours. However, the record does not provide specific examples of actions taken by dispatchers to address these emergencies. On brief, the Employer maintains the dispatchers assess mechanical problems with the driver and engage in a multi-step process to develop a response, but the record provides no support for this assertion. A dispatcher testified that a driver may contact the maintenance provider if the driver is unable to do so, and the dispatcher may ask Customer Service to contact the customer and make alternative delivery arrangements, but there is no evidence the dispatchers are acting as decision makers or are giving orders to the drivers or Customer Service.

In support of its arguments as to "assignment," the Employer cites *Entergy Mississippi*, 367 NLRB No. 109 (2019), involving electric utility dispatchers, and *Polynesian Hospitality Tours, Inc.*, 297 NLRB 228 (1989), involving dispatchers for a fleet of tour vehicles. Both cases are clearly distinguishable.

In *Entergy*, on remand from the Fifth Circuit Court of Appeals, the Board, applying "the law of the case," concluded that dispatchers utilized independent judgment because, in making decisions regarding where to allocate resources during emergency outages, they considered factors including whether a priority customer was affected, the location of the trouble spots, whether additional trouble was likely to occur, current and future weather conditions, and whether a particular outage was likely to cause damage to the employer's property. These elements, the allocation of limited resources and multi-factor decision-making outside of specific instructions or guidelines, are not present in the instant case. Rather, the Employer's dispatchers assign routes based on clear, simple guidelines that do not require any discretion on their part.¹¹

In *Polynesian Hospitality Tours*, *supra*, dispatchers regularly made or changed assignments to tour drivers and narrators after taking into account factors such as their language skills, ability to deal with equipment, proximity of the driver to the facility, and whether their assignment would result in overtime pay, and they had the authority to make assignments in order to reward drivers or accommodate their personal preferences. These decisions involved dispatcher discretion that is not present in the instant case.

¹¹ See also *Atlantic City Electric Co.*, 2019 WL 7584366 (N.L.R.B.), in which the Board distinguished *Entergy Mississippi* on the ground that the Employer failed to meet its burden to demonstrate that dispatchers and other disputed classifications used independent authority to assign or responsibly direct employees.

Finally, in regard to assignment, the Employer makes much of the dispatchers being the highest-ranking officials in the Employer's organization due to the current absence of a terminal manager. This contention is unpersuasive given the extensive evidence of participation in the dispatch process by C&S -- a significant portion of decision-making in the dispatch process is contained in the K-14 report, or in standing instructions by Zekas, and dispatchers may consult with Zekas when they have issues. Given the significant role C&S plays in the process, the temporary terminal manager vacancy does not indicate an increased use of independent judgment by the dispatchers.

The above, taken together, suggests dispatchers, in pairing drivers and routes, ruling on time-off requests, allocating overtime, dealing with emergencies, and distributing electric pallet jacks, engage in the routine application of the Employer's policies. *Oakwood* directs that the existence of company policies does not eliminate independent judgment if these policies allow for discretionary choices, but the Employer's policies do not allow for the use of discretion. Therefore, I find these decisions are not imbued with independent judgment and as such do not convey supervisory status under Section 2(11). *Austal USA, L.L.C.*, 349 NLRB 561, 561 n. 6 (2007); *Croft Metals*, 348 NLRB 717, 721 (2006); *Central Cartage, Inc.*, 236 NLRB 1232, 1246 -1253 (1978); *Spector Freight System, Inc.*, 216 NLRB 551 (1975). Cf. *The Arc of South Norfolk*, 368 NLRB No. 32, slip op. at 4 (2019).

b. Responsibly Direct

The Board has defined "responsibly to direct" as: "If a person on the shop floor has 'men under him,' and if that person decides 'what job shall be undertaken next or who shall do it,' that person is a supervisor, provided that the direction is both 'responsible'... and carried out with independent judgment." *Oakwood*, 348 NLRB at 691. The Board explained that direction is "responsible" when the person delegating the task is held accountable for the performance of the task by others and there is the prospect of adverse consequences if the tasks are not performed properly. *Id.* at 692. For example, leadpersons in a manufacturing setting were held accountable where they received written warnings because their crews failed to meet production goals. *Croft Metals*, 348 NLRB at 722. On the other hand, when a charge nurse was disciplined for failing to make fair assignments, she was held accountable only for her own performance and not that of other employees. *Oakwood*, 348 NLRB at 695.

The Employer presented no evidence that any dispatcher has experienced any material consequences to his or her terms and conditions of employment, either positive or negative, as a result of their performance in directing drivers. Indeed, Zekas testified that he could not recall any instances of a dispatcher being held at fault for the non-delivery of orders. As there is no evidence of dispatchers being held accountable for the actions of drivers, the Employer has failed to meet its burden in regard to demonstrating responsible direction.

c. Discipline

The actual authority to discipline, rather than "paper authority" present in job descriptions and other documents, is necessary to establish supervisory status. *Golden Crest, supra* at 731, quoting *Training School at Vineland, supra* at 1416 (2000). The authority to point out and correct

deficiencies in the job performance of other employees is insufficient to establish that an employee is a supervisor under Section 2(11) of the Act. *Franklin Home Health Agency*, 337 NLRB 826, 830 (2002). In addition, an employee does not become a supervisor if his or her participation in personnel actions is limited to a reporting function and there is no showing that it amounts to an effective recommendation that will affect employees' job status. *Ohio Masonic Home*, 295 NLRB 390, 393 (1989). Rather, to confer 2(11) status, the exercise of disciplinary authority must lead to personnel action, without the independent investigation or review of other management personnel. *The Republican Co.*, 361 NLRB 93 (2014).

The Employer relies upon the two incidents where a driver was terminated as evidence that dispatchers have the authority to discipline drivers, or effectively recommend discipline. However, neither instance demonstrates such authority. In the first instance, where a driver made a threat of violence against the dispatchers and others, a dispatcher merely reported the incident and provided the video recording of the incident to management. The Employer's policies obligate a dispatcher to make a report in this situation, as stated in the May email from Zekas, and there is no concrete evidence the dispatchers reporting the incident were involved beyond that reporting. There is no evidence of a recommendation by the dispatcher, and indeed management reviewed the situation and made the termination decision.

The second incident, involving the driver terminated after a failed drug test following an accident, similarly does not provide support for the Employer's contention. When a driver reports an accident to a dispatcher, the dispatcher is expected to notify the driver of the need to take a drug test. The dispatchers do not decide or consider whether to have the driver take the test, they merely notify the driver of the Employer policy and DOT requirement, neither of which the dispatcher can modify. Thus, this termination was a function of policy, not dispatcher judgment.

In sum, there is insufficient evidence to show that the dispatchers possess disciplinary authority or any of the other supervisory indicia set forth in Section 2(11), and I therefore find that the Employer has not met its burden to demonstrate that dispatchers are supervisors within the meaning of the Act.

III. METHOD OF ELECTION

At the hearing, both parties expressed a preference for a manual election, but in the time since the hearing, the COVID-19 pandemic has intensified, in Pennsylvania and throughout the United States.

The Board's longstanding policy is that elections should, as a rule, be conducted manually. See National Labor Relations Board Casehandling Manual (Part Two) Representation Proceedings, Sec. 11301.2; *San Diego Gas and Electric*., 325 NLRB 1143, 1145 (1998). However, the Board has stated that a Regional Director may reasonably conclude, based on circumstances tending to make voting in a manual election difficult, to conduct an election by mail ballot. *Id.* This includes a few specific situations addressed by the Board, including where voters are "scattered" over a wide geographic area, "scattered" in time due to employee schedules, in strike situations, or other unspecified extraordinary circumstances. *San Diego Gas and Electric*., *supra*.

Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to ensure the fair and free choice of bargaining representatives, and the Board in turn has delegated the discretion to determine the arrangements for an election to Regional Directors. *San Diego Gas and Electric, supra*; *Halliburton Services*, 265 NLRB 1154 (1982); *National Van Lines*, 120 NLRB 1343, 1346 (1958); *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946). This discretion includes the ability to direct a mail-ballot election where appropriate. *San Diego Gas & Electric*. at 1144-1145. The Regional Director's decision should not be overturned unless a clear abuse of discretion is shown. *National Van Lines* at 1346.

During the COVID-19 pandemic, the risk of infection associated with gatherings and in-person activities has impacted the way the Board conducts its elections, leading to an increase in the number of elections conducted by mail. After a brief pause in elections early in the pandemic, the Board resumed conducting elections in April, with many Regional Directors directing primarily mail-ballot elections in light of the extraordinary circumstances presented by the COVID-19 pandemic. To assist Regional Directors in safely conducting elections, on July 6 the General Counsel issued a memorandum titled "Suggested Manual Election Protocols," *Memorandum GC 20-10*, setting forth detailed suggested safety procedures.

Thereafter, in *Aspirus Keweenaw*, 370 NLRB No. 45 (Nov. 9, 2020), the Board addressed how Regional Directors should assess the risks associated with the pandemic when considering the appropriate method of election. In doing so, the Board reaffirmed its longstanding policy favoring manual elections, but outlined six situations that suggest the propriety of mail ballots. Specifically, when one or more of the following situations is present, a Regional Director should consider directing a mail-ballot election:

1. The Agency office tasked with conducting the election is operating under "mandatory telework" status;
2. Either the 14-day trend in number of new confirmed cases of COVID-19 in the county where the facility is located is increasing, or the 14-day testing positivity rate in the county where the facility is located is 5 percent or higher;
3. The proposed manual election site cannot be established in a way that avoids violating mandatory state or local health orders relating to maximum gathering size;
4. The Employer fails or refuses to commit to abide by *GC Memo 20-10*, Suggested Manual Election Protocols;
5. There is a current COVID-19 outbreak at the facility or the employer refuses to disclose and certify its current status; or
6. Other similarly compelling circumstances.

After careful examination of the record, the parties' positions, and the current state of the COVID-19 virus in Pennsylvania and Northampton County, where the Bethlehem facility is located, I have determined that a mail-ballot election is the appropriate option based on the second factor.

The first *Aspirus Keweenaw* factor does not favor a mail ballot - the Regional Office is not currently in mandatory telework status. Regarding the third factor, I find no state, county or local measure as to maximum gathering size would be implicated by a manual election. With respect to the fourth factor, the Employer's commitments regarding precautions for a manual election are generally consistent with *GC Memo 20-10*, and as to the fifth factor, there is no basis to find a COVID-19 outbreak is ongoing at the Employer's facility.

In addressing the second factor – whether the 14-day trend in the number of new confirmed cases of COVID-19 in the county where the facility is located is increasing, or whether the 14-day testing positivity rate in the county where the facility is located is 5 percent or higher – the Board directs Regional Directors to utilize the data published by Johns Hopkins University, or data from official state or local government sources. Where county level data are not available, Regional Directors should look to state level data.

The Johns Hopkins University COVID-19 Status Report for Northampton County, Pennsylvania on December 22 reports a 14-day increase from 233 cases to 320.¹²

Neither Pennsylvania nor Northampton County publish a 14-day testing positivity rate, and as such the data for Pennsylvania as a whole is the best available. On December 22, the 14-day positivity rate in Pennsylvania was 39.11 percent.¹³ That rate is almost eight times higher than the 5 percent threshold the Board set forth in *Aspirus*.

Thus, both the increase in positive cases in Northampton County and the extremely high positivity rate in Pennsylvania make a manual election unwise at the moment, and I have therefore directed a mail ballot election.

CONCLUSION

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, as stipulated by the parties, and it will effectuate the purposes of the Act to assert jurisdiction herein.
3. The parties stipulated, and I find, that Petitioner is a labor organization within the meaning of Section 2(5) of the Act.
4. The parties stipulated, and I find, that that there is no collective-bargaining agreement covering any of the employees in the unit sought, there is no

¹² <https://bao.arcgis.com/covid-19/jhu/county/42095.html>

¹³ <https://coronavirus.jhu.edu/testing/testing-positivity>

contract bar or other bar to an election, and there is no collective bargaining history for the employees in the petitioned-for unit.

5. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
6. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

Included: All full-time and regular part-time dispatchers employed by the Employer at its facility located at 125 North Commerce Way, Bethlehem, Pennsylvania.

Excluding: All other employees, guards and supervisors as defined by the Act.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by International Brotherhood of Teamsters, Local 773.

A. Election Details

The election will be conducted by mail. The mail ballots will be mailed to employees employed in the appropriate collective-bargaining units on **January 5, 2021**. Voters must return their mail ballots so that they will be received by close of business on **January 26, 2021**. The mail ballots will be counted on **February 2, 2021** at a time and location to be determined, either in person or otherwise, after consultation with the parties.

If any eligible voter in either election does not receive a mail ballot or otherwise requires a duplicate mail ballot kit, he or she should contact the Region Four office no later than 5:00 p.m. on **January 12, 2021** in order to arrange for another mail ballot kit to be sent to that employee.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending **immediately prior to the issuance of this decision**, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well

as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

C. Voter List

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the Regional Director and the parties by **December 29, 2020**. The list must be accompanied by a certificate of service showing service on all parties. **The Region will not serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election accompanying this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 10 business days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review must be E-Filed through the Agency's website and may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001, and must be accompanied by a statement explaining the circumstances concerning not having access to the Agency's E-Filing system or why filing electronically would impose an undue burden. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board. If a request for review of a pre-election decision and direction of election is filed within 10 business days after issuance of the decision and if the Board has not already ruled on the request and therefore the issue under review remains unresolved, all ballots will be impounded. Nonetheless, parties retain the right to file a request for review at any subsequent time until 10 business days following final disposition of the proceeding, but without automatic impoundment of ballots.

Signed at Philadelphia, Pennsylvania this 23rd day of December 2020.

A handwritten signature in black ink, appearing to read "Thomas Goonan". The signature is written in a cursive, flowing style.

THOMAS A. GOONAN
Regional Director, Region Four
National Labor Relations Board